

FEDERAL CIRCUIT COURT OF AUSTRALIA

GUNATILLAKE v MINISTER FOR IMMIGRATION & ANOR

[2020] FCCA 871

Catchwords:

MIGRATION – Persecution – review of Administrative Appeals Tribunal (“Tribunal”) decision – visa – partner visa – refusal.

ADMINISTRATIVE LAW – Allegation that the Tribunal’s decision affected by jurisdictional error by reason that the Tribunal failed to consider all the evidence fundamental to its decision.

PRACTICE & PROCEDURE – Late application to amend pleading – relevant considerations.

Legislation:

Migration Act 1958, ss.5F, 474

Migration Regulations 1994, reg.1.15A, cl.801.221

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Applicant:	RICHIE ANURADHA GUNATILLAKE
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 795 of 2017
Judgment of:	Judge Cameron
Hearing date:	12 March 2020
Date of Last Submission:	12 March 2020
Delivered at:	Sydney
Delivered on:	20 April 2020

REPRESENTATION

Counsel for the Applicant:	Mr L. Karp
Solicitors for the Applicant:	Langenberg Law
Counsel for the Respondents:	Mr N. Swan
Solicitors for the Respondents:	Mills Oakley

ORDERS

- (1) The applicant file and serve a further amended application in the form of exhibit 1 within seven days.
- (2) The applicant pay the first respondent's costs thrown away by reason of the amendment.
- (3) The application be dismissed.
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 795 of 2017

RICHIE ANURADHA GUNATILLAKE

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. The applicant is a citizen of Sri Lanka who arrived in Australia in 2006 on a student visa. On 13 November 2013 he lodged an application for a Partner (Residence) (Class BS) visa with what is now the Department of Home Affairs (“Department”). The applicant’s application was refused by a delegate of the first respondent (“Minister”) on 4 November 2015. The applicant then applied to the Administrative Appeals Tribunal (“Tribunal”) for a review of that departmental decision. The applicant was unsuccessful before the Tribunal and has applied to the Court for review of that decision.

2. In this judicial review proceeding the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 of the *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
3. For the reasons which follow, the application will be dismissed.

LEGISLATION

4. At all material times s.5F of the Act provided as follows:

5F Spouse

- (1) *For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.*
 - (2) *For the purposes of subsection (1), persons are in a married relationship if:*
 - (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (c) *the relationship between them is genuine and continuing; and*
 - (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
 - (3) *The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.*
5. At all material times reg.1.15A of the *Migration Regulations 1994* ("Regulations") provided relevantly as follows:

1.15A Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

...

(c) a Partner (Residence) (Class BS) visa; or

...

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

- (i) *whether the persons represent themselves to other people as being married to each other; and*
- (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
- (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

...

6. At all material times cl.801.221 of sch.2 to the Regulations provided relevantly as follows:

801.22—Criteria to be satisfied at time of decision

801.221

- (1) *The applicant meets the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).*
- (2) *An applicant meets the requirements of this subclause if:*
 - (a) *the applicant is the holder of a Subclass 820 visa; and*
 - (b) *the applicant continues to be sponsored for the grant of a Subclass 820 (Partner) visa by:*
 - (i) *the sponsoring partner; or*

...

(c) *the applicant is the spouse or de facto partner of the sponsoring partner*

(d) *subject to subclauses (6A) and (7), at least 2 years have passed since the application was made.*

...

(6) *An applicant meets the requirements of this subclause if:*

...

(b) *the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and*

(c) *either or both of the following circumstances apply:*

(i) *either or both of the following:*

(A) *the applicant; ...*

has suffered family violence committed by the sponsoring partner.

...

BACKGROUND FACTS

7. In its decision the Tribunal summarised the facts alleged in support of the applicant's claim for a Partner (Residence) (Class BS) visa. As summarised by the Tribunal, the applicant relevantly made the following claims:

Background

- a) in 2006 the applicant arrived in Australia on a student visa. Between 2006 and 2011 he undertook tertiary study and, thereafter, worked as a car salesman;
- b) on 26 June 2012 the applicant and his wife ("Sponsor") met for the first time after his parents had advertised for a wife for him in a Sri Lankan newspaper. The applicant and Sponsor claimed, at the time of making the visa application, that their committed relationship commenced on 2 September 2012 and since 17

November 2012 they had resided together. They married in Sri Lanka on 14 July 2013;

- c) the Sponsor was a student at the time the visa application was made. The applicant said that in 2014 she was having trouble passing her second year veterinary science exams and, at the same time, they were also having difficulties with their relationship;
- d) on 3 February 2015 the Sponsor advised the Department that six months earlier she and the applicant had separated, the marriage had not worked out and they would soon be divorced;

Applicant's claims

- e) at the Tribunal hearing the applicant's mother gave evidence that although she had not met the Sponsor at the time of arranging the marriage, she thought the couple would be compatible based on their horoscopes. She said the applicant and Sponsor had had "unpleasant incidents based on disagreements and arguments" soon after the wedding and their parents attempted to counsel them. She said that upon returning to Australia the Sponsor seemed less pleased about the marriage than she had been in Sri Lanka;
- f) in February 2013 the applicant moved into accommodation the Sponsor shared with her two cousins. From February 2014 the applicant and Sponsor resided in a Brisbane property owned by her father;
- g) the applicant claimed that from 14 March 2014 he began to suffer family violence when the sponsor became "irrational" around exam time. He claimed it was only after the relationship had ended and he sought help from a psychologist that he realised he had suffered family violence;
- h) the applicant claimed that the Sponsor had bought a dog in April 2014, they opened a bank account together in May 2014 and, after becoming pregnant, the Sponsor had a termination in June 2014;
- i) the applicant claimed that in early September 2014 the Sponsor left for Canberra to go "home" to her parents but came back later

that month. At the Tribunal hearing he and his mother claimed that the Sponsor left several times in 2014 but had always returned;

- j) the Sponsor left permanently on 25 January 2015. On 5 February 2015 the Department notified the applicant of the sponsor's advice that their relationship had ended. At the Tribunal hearing the applicant claimed that despite experiencing "abuse" and "humiliation", he had not "give[n] up" on the relationship until he heard that the Sponsor had withdrawn her sponsorship;

Sponsor's claims

- k) there was no appearance or submission made by or on behalf of the Sponsor at the Tribunal hearing. However, she had contacted the Department:
 - i) on 2 December 2014 to find out the impact any separation would have on the applicant's visa application; and
 - ii) on 4 February 2015 notifying it that their marriage had been unsuccessful and they had separated six months earlier;
- l) in an affidavit sworn in divorce proceedings, the Sponsor deposed that she and the applicant had not lived as a married couple since their relationship ended in July 2014. They avoided one another and locks had been fitted to their house's internal doors. She deposed that they remained at her father's Brisbane property because neither of them had anywhere else to go and because the applicant would not leave; and
- m) in the divorce proceedings, the Sponsor's father swore an affidavit deposing that from February 2013 the applicant and Sponsor's "emotional connection" had "deteriorated" and that since July 2014 they had lived "separate lives under the same roof". He deposed that although civil they had predominately ignored each other, had not shared the day-to-day household tasks and the applicant had mostly socialised with his friends.

Tribunal's Decision

8. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant met the criteria for the grant of the Partner (Residence) (Class BS) visa. The Tribunal's decision was based on the following findings and reasons:

- a) the Tribunal was satisfied that the Sponsor was a sponsoring partner of the applicant as required by cl.801.221(2)(c) of the Regulations and accepted that the pair had willingly participated in a traditional, arranged marriage which was valid for the purposes of s.5F(2)(a) of the Act;
- b) as to whether the parties met the requirements of a spousal relationship which are found in s.5F(2)(a)-(d) of the Act and the financial and social factors of their relationship as set out in reg.1.15A(3) of the Regulations the Tribunal considered the following:
 - i) there was no evidence of joint assets or liabilities, wills, superannuation or joint loans. A joint bank account was opened in May 2014;
 - ii) the applicant acknowledged that he was responsible for supporting the Sponsor while she studied, but that her criticism of his income, expectations of his financial obligations and her failure to recognise or appreciate his financial contribution was a major cause of his "unhappiness and resentment" in the relationship;
 - iii) the joint account's average account balance was too low and the number of transactions too few in the period between November 2014 and January 2015 to suggest the parties shared financial resources or day-to-day household expenses;
 - iv) until February 2014 they had lived with the Sponsor's cousins;

- v) the applicant's claim that he did the majority of the housework in 2014 because the Sponsor was studying was unsubstantiated by evidence and her father's evidence was that since July 2014 they did not share housework and had lived separately;
 - vi) the Sponsor's father claimed the applicant and sponsor had been "emotionally distant" from February 2013. The applicant's mother said that from June 2014 the Sponsor's behaviour was "unacceptable", the household "dysfunctional" and that the Sponsor often stayed with her friends or family;
 - vii) various photos of the applicant and Sponsor as a couple, with friends and at their wedding;
 - viii) the couple's parents saw them as married (although not successfully so, as evidenced by suggestions of counselling) and in social situations they were perceived to be a couple despite the Sponsor "distanc[ing] herself from and humiliat[ing] him";
 - ix) Facebook posts and text messages indicated that they were "in some sort of relationship" between June and August 2014; and
 - x) although "unhappy", "humiliated" and "abused", prior to the Sponsor withdrawing her sponsorship, the applicant alleged that he thought the relationship genuine and that "on a deeper level" he had been committed to it;
- c) the Tribunal was not persuaded by statutory declarations made by the applicant's friends stating that they believed the applicant and Sponsor to be married until early 2015 when they were told the relationship had ended. It preferred the evidence of the sponsor and her father that the relationship had effectively ended in July 2014;
- d) the Tribunal was not satisfied that, despite living together, the pair had willingly pooled finances or established a household as part of a mutually committed, ongoing relationship; and

- e) the Tribunal was not satisfied that the applicant and the Sponsor had been in a married relationship for the purpose of s.5F(2)(a)-(d) of the Act in March 2014, when the applicant claimed to have suffered the first incident of family violence. It concluded that the applicant therefore did not satisfy cl.801.221(6)(b) of the Regulations.

THE PROCEEDING IN THIS COURT

9. Shortly before the hearing, the applicant retained new counsel who advised a revision of the amended application which had been filed in 2017. A proposed further amended application, which became exhibit 1, was foreshadowed and detailed in written submissions that were filed on 28 February 2020, less than two weeks before the trial. This was notwithstanding the order made at the call over in this matter on 22 January 2020, as amended on 24 January 2020, that any further amendment of the application had to be sought by application in a case filed not less than four weeks before the trial.
10. Following argument, I was satisfied that the applicant had a satisfactory explanation for seeking such a late amendment and noted that the Minister did not suggest that he would be prejudiced in a material fashion were the amendment to be permitted. However, the Minister did submit that the amendment lacked merit sufficient to justify it receiving leave.
11. As the only matter seriously in contention on the application to amend concerned the merits of the proposed new allegation, which replaced what had been pleaded previously, I concluded that the most efficient approach to the matter would be to hear full argument on the proposed allegation and to decide the question of leave, and perhaps the proceeding as a whole, in light of those arguments.
12. It was pleaded in the proposed further amended application that:
1. *The Tribunal erred in failing to consider, in the sense of directing an active intellectual process to, evidence fundamental to its assessment of whether the applicant and his former spouse were in a relationship which met the criteria in ss 5F(2)(b) and (c) of the Migration Act.*

Particulars

- (a) *Evidence that the applicant's former spouse was a full time student and not in employment at all times during their relationship, which was relevant to the Tribunal's assessment of the financial circumstances of the relationship.*
- (b) *Evidence contained in the following documents which was consistent with the parties to the marriage being in a genuine relationship;*
 - (i) *The spouse's statement at CB 77 that at the time of lodgement of the visa application (Nov 2013) the relationship was genuine.*
 - (ii) *The applicant's statement at in particular at CB 266-268.*
 - (iii) *The applicant's mother's statement at CB 239-41.*
 - (iv) *A psychologist's statutory declaration at CB 235-6.*
- (c) *Affidavits of the applicant's spouse and her father made for the purpose of the divorce proceedings.*

CONSIDERATION

13. The applicant referred to paras.44-46 of the Tribunal's decision record, where the Tribunal said:

- 44. *The Tribunal is not satisfied that the parties ever pooled or willingly shared their finances commensurate with an established married relationship. The Tribunal accepts that the parties have lived in the same house, but is not satisfied that they ever established their own household as a couple in a mutually committed and ongoing relationship. The Tribunal accepts that the parties had mutual friends, and that they may have continued to socialise with these friends while living in the same house, but does not accept this as persuasive evidence that they lived together in a genuine and ongoing spousal relationship.*
- 45. *In light of the detailed affidavits provided by the sponsor and her father in the divorce proceedings stating that the parties lived separate lives from July 2014, the Tribunal does not find persuasive the written statements provided by the applicant's friends in which they all confirm that they*

had met the sponsor and they all state that they believed that the parties were in a genuine spousal relationship until late January or early February 2015.

46. *The Tribunal is not satisfied that at the time of the claimed onset of family violence in March 2014 the parties had a mutual commitment to shared life to the exclusion of others, were in a genuine and continuing relationship, and lived together and not separately and apart on a permanent basis.*

14. Those paragraphs set out the conclusions drawn by the Tribunal from the evidence and arguments it had summarised earlier in its decision record.
15. At the outset it must be stressed that the allegation was that the Tribunal failed to consider evidence relevant to whether “the applicant and his former spouse were in a relationship which met the criteria in ss.5F(2)(b) and (c) of the Migration Act”, that being central to the review function it was performing. The implication of the allegation was that the Tribunal had erroneously failed to find that the couple had been in a relationship. However, significantly, the allegation’s particulars did not refine the allegation by reference to a particular period. In making that observation I have not overlooked the applicant’s reliance on s.5F(2)(c), which required the relationship to be on foot at the time of the Tribunal’s decision, but I note that before the Tribunal it was not contentious that the relationship had ended in divorce some time earlier.
16. The allegation, in the broad way pleaded, is answered by para.43 of the Tribunal’s reasons where it was found that the couple had indeed been in a genuine spousal relationship albeit that that period had ended. The Tribunal said:

The Tribunal accepts that the parties willingly participated in their traditional arranged marriage in Sri Lanka in July 2013 and that they were recognised by family and friends in Sri Lanka and Australia as married. The Tribunal is not satisfied that the parties were still in a mutually committed spousal relationship in March 2014 when the applicant claimed he suffered the first incident of family violence.

17. However, the proposed allegation was expanded by the applicant's submissions. He submitted that the three conclusory paragraphs quoted earlier contained the following elements:

- (i) *[The Tribunal] was not satisfied that the parties pooled their financial resources, "commensurate with an established married relationship"*.
- (ii) *[The Tribunal] was not satisfied that they ever established their own household as a couple in a mutually committed and ongoing relationship.*
- (iii) *[The Tribunal] found that the couple had mutual friends and that they continued to socialise whilst living in the same house, but it did not accept this as persuasive evidence of a genuine and ongoing spousal relationship.*
- (iv) *In light of the "detailed affidavits provided by the sponsor and her father in the divorce proceedings" [the Tribunal] rejected the written statements of [the applicant's] friends.*
- (v) *[The Tribunal] reached the conclusion, on the basis of the above findings that the parties were not in a relationship that satisfied ss 5F(2)(b) and 5F(2)(c).*

Paragraph (i) of the applicant's written submissions
Paragraph 1(a) of the proposed pleading

18. The applicant argued that the conclusion at (i) above ignored the fact that the Sponsor was a full time student for the duration of the relationship, and the applicant's evidence that he was looking after all her needs. He submitted that the Sponsor's lack of income during their relationship was highly relevant to their ability to pool resources. The summary of the Tribunal's findings set out earlier in these reasons evidences that the Tribunal was aware of the support that the applicant alleged he provided, or sought to provide, to the Sponsor. However, it decided on the facts that other evidence, which indicated that their financial life was not a joint enterprise, was more persuasive. No reviewable error arises out of it having done so.

Paragraph (ii) of the applicant's written submissions
Paragraph 1(b) of the proposed pleading

19. The applicant argued that the conclusion referred to in (ii), that the Tribunal was not satisfied that the couple ever established their own household as a couple in a mutually committed and ongoing relationship, ignored:
- (a) *[The Sponsor's] statement at CB 77 that at the time of lodgement of the visa application (Nov 2013) the relationship was genuine.*
 - (b) *[The applicant's] statement at [sic] in particular at CB 266-268 which is consistent with a genuine relationship.*
 - (c) *[The applicant's] mother's statement at CB 239-41 which is consistent with there having been a genuine relationship, albeit one in difficulty.*
 - (d) *[The applicant's psychologist's] statutory declaration at CB 235-6 in which she concluded that in her professional opinion [the applicant] was the victim of family violence perpetrated by his wife.*
20. The applicant submitted that this evidentiary material was highly relevant to the question whether a genuine relationship existed as at March 2014. It will be noted that this was a new approach as the proposed further amended application made no reference to March 2014.
21. It was observed earlier that the Tribunal accepted that the couple's marriage had been genuine and had remained on foot for a period. The relevant, remaining issue for the Tribunal was whether the spousal relationship was on foot in March 2014, when family violence allegedly occurred. The statement referred to in particular 1(b)(i) was not relevant to that issue and so even if the Tribunal had not had regard to it, that would not have been an error.
22. As to particular 1(b)(ii), the applicant's statement reproduced at pages 266-268 of the Court Book described the couple's relationship but said nothing substantive about how their household operated other than that the Sponsor had cared for the applicant on one occasion when he was ill and they had bought a dog. If the Tribunal said nothing about this

statement in the context of the couple's household, it was because there was nothing useful to rehearse.

23. The statement made by the applicant's mother and reproduced at CB239-241 referred to in particular 1(b)(iii) also said nothing about the couple's household and the psychologist's statutory declaration referred to in particular 1(b)(iv) did not either. That they were not mentioned in that context is not evidence of error.
24. If the contents of the documents referred to by the applicant had been relevant to how the couple's household was established and ran, then a failure to discuss them might have grounded a finding that they had not been considered. However, as the Tribunal was under no duty to refer to evidence which was not the foundation of findings of fact, such an inference would not be appropriate in relation to the documents cited by the applicant. The appropriate conclusion is that they were not mentioned because they were not considered material to the issue in question.

Paragraphs (iii) and (iv) of the applicant's written submissions Paragraph 1(c) of the proposed pleading

25. The applicant submitted in relation to these paragraphs, that paras.35 and 36 of the Tribunal's reasons were "undermined by a misreading of the evidence". The Tribunal said there:

35. *The sponsor's father claimed that he noticed when visiting the parties from February 2013 that they were emotionally distant. The applicant's mother claimed that during her visit in June 2014 the household was dysfunctional, with the sponsor behaving unacceptably and leaving to stay with friends and family.*

36. *As noted above, the sponsor and her father claimed in sworn statements provided in divorce proceedings that the parties lived separate lives while living under the same roof from July 2014, and that although they remained civil they did not share their money or cook or shop or clean for each other.*

26. The applicant argued that the first sentence of para.35 was incorrect because what the Sponsor's father had in fact said in his affidavit in support of the couple's divorce was:

... that he and his wife casually visited the couple from time to time from February 2013, and noticed that there were disagreements, and that, "Over time we noticed that the emotional connection between the couple had deteriorated". ...

27. This argument reads the Tribunal's reasons with an eye keenly attuned to the perception of error, which is not the correct approach. It is a fair paraphrase of the relevant evidence which had been cited earlier in the Tribunal's reasons in the following terms:

The sponsor's father in an affidavit attached to the divorce proceedings stated that he visited the couple from February 2013 and noticed 'deterioration in their emotional connection'.

28. The applicant argued in relation to para.36 that all the Sponsor had relevantly said in her affidavit was that there were fewer family outings and shared activities after the couple's separation in July 2014. He submitted that:

... She did not say that they did not happen at all. The friends' statements (statutory declarations in fact) were therefore dismissed because of the failure of the Tribunal to understand what was actually said in those affidavits.

29. Paragraph 36 was merely part of the Tribunal's summary of the evidence. The relevant finding was set out in para.45 of the Tribunal's decision in the following terms:

In light of the detailed affidavits provided by the sponsor and her father in the divorce proceedings stating that the parties lived separate lives from July 2014, the Tribunal does not find persuasive the written statements provided by the applicant's friends in which they all confirm that they had met the sponsor and they all state that they believed that the parties were in a genuine spousal relationship until late January or early February 2015.

30. The applicant has not demonstrated any error in that conclusion. It was open to the Tribunal to find that some evidence was to be preferred over other evidence. In this case, the Tribunal preferred the evidence of the Sponsor and her father, evidence which it described as "detailed".

CONCLUSION

31. Although I am not persuaded that the grounds the applicant seeks to raise justify a finding of jurisdictional error on the Tribunal's part, they were not so lacking in merit that he should be refused leave to rely on them.
32. Consequently, leave to file a further amended application in the form of exhibit 1 will be granted and the applicant directed to do so within seven days.
33. However, for the reasons given, the grounds sought to be relied on do not demonstrate jurisdictional error and so the application will be dismissed.
34. The parties were agreed that the Minister should have his costs thrown away by reason of the amendment.

I certify that the preceding thirty-four (34) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 20 April 2020